assets. The assignee in bankruptcy availed himself in some manner of the trustee's right to reimbursement at the hands of the *cestui que trust,* and the question was whether the plaintiff was entitled to the fund so acquired in preference to the general creditors of the insolvent. It was decided that he was so entitled, though in reaching this conclusion the court laid down no comprehensive principle to cover such situations. Yet, leaving out of sight the question as to the right of the assignee in bankruptcy to recover the fund at all, it seems impossible to justify the result except on the theory that there existed in favor of the plaintiff some special equity against it; otherwise he could not take precedence over the general creditors. It also seems clear that this equity was not created by the action of the assignee in collecting the fund. It must have owed its existence to the fact that the plaintiff was a creditor of the insolvent trustee, and that on account of that debt the latter had the right to indemnity at the hands of the *cestui que trust.* If so, the equity must have existed from the moment the trustee became unable to meet his obligation, and we are brought face to face with the proposition that upon his insolvency the principal creditor had an equity against the *cestui que trust* which, under the English doctrine above referred to,[14] was at that time absolutely unavailing. In other words, the result that an equity existed after the liquidation by the assignee of the right of indemnity, seems inconsistent with the notion that the creditor of an insolvent trustee in respect to the trust estate may not be substituted to the trustee's right to indemnity. It would seem that the sound and just way to work out the creditor's rights would have been to declare that, since substantially the *cestui que trust* is the ultimate debtor, equity, looking through form to substance, and acting on the principles and analogies above pointed out, will cause the principal creditor to be subrogated to the rights of his immediate debtor. In this view the rights of the creditor would be unaffected by the bankruptcy, and the assignee, having collected the fund, would hold it merely as his trustee, and would of course be obliged to turn it over upon demand.

EXTRA-TERRITORIAL ENFORCEMENT OF TAX LIABILITY.—A question which seems to be one of first impression in this country was presented in the recent case of *Maryland* v. *Turner* (1911) 46 N. Y. Law Journal No. 47. The State of Maryland sought to collect a tax, levied upon personalty while defendant was a resident of that State, by means of a common law action in New York. Regardless of the fact that the Maryland courts consider a liability such as that of the defendant to be in the nature of a contract, it was declared to be in effect a penalty, and recovery was denied on this and on the further ground that this tax belonged to a class of foreign laws and statutes which are never accorded any extra-territorial recognition. Clearly the New York court has the right to determine for itself the question as to whether the action is to enforce a penalty,[1] and if it answers in the affirmative, to refuse relief. It is elementary that no country executes the penal laws of another,[2] and it may be conceded

[14]Strickland *v.* Symons *supra.*

[1]Huntington *v.* Attrill (1892) 146 U. S. 657, 682.

[2]The Antelope (1825) 10 Wheat. 66, 123.

that this rule embraces all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes protective of its revenues.[3] But a tax law can scarcely be said to come within this definition. The cases clearly lay it down that a statute, although in some aspects it may be called penal, is only a penal law in the international sense if its purpose is to punish an offence against the public justice of the State.[4] On the other hand, it seems that a tax does not partake of the nature of a debt,[5] nor does the conversion thereof into a judgment bring into play the technical considerations which often make such obligation an impliedly contractual one.[6] In some jurisdictions, indeed, where a statute provides for a tax, but not for the method of its collection, it is held that the right to a remedy by suit at law must be implied,[7] but this conception that the defendant is necessarily obligated to pay does not of itself engraft a contractual character upon a tax liability. To consider this liability contractual or even quasi-contractual would involve the adoption of a fiction violating the principle of the necessity of consensuality, and ignoring the fact that the tax operates completely *in invitum*.[8] But in spite of the constant efforts to classify a tax liability under one head or the other, a searching analysis must be convincing of the fact that, like many other statutory liabilities, it is in its nature neither contractual, nor quasi-contractual, nor yet a penalty. We have seen that the imposition of a tax without provision for its collection gives a right of action.[9] Even if no common law remedy exists in New York for the collection of a domestic tax,[10] it seems that where a right of action, given by a Maryland statute, is of a nature recognized in New York, the fact that the procedure provided in New York for its enforcement is not the same should not be decisive. In spite, then, of the decisions to the contrary in this State,[11] the more modern and liberal rule, that a similar right of action may be enforced even if

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[3]Wisconsin *v.* Pelican Ins. Co. (1888) 127 U. S. 265.

[4]Huntington *v.* Attrill *supra.*

[5]1 Cooley, Taxation, (3rd ed.) 17-19.

[6]Wisconsin *v.* Pelican Ins. Co. *supra.*

[7]2 Cooley, Taxation, (3rd ed.) 836. In a few jurisdictions a tax is regarded as a debt pure and simple. State *v.* Nashville Savings Bank (Tenn. 1885) 16 Lea 111; City of Henrietta *v.* Eustis (1894) 87 Tex. 14; and in a few others the law provides that taxes shall be deemed to be debts, State *v.* Travelers Ins. Co. (1898) 70 Conn. 590, 602.

[8]It is settled in New York that a tax is in no sense a contract. City of Rochester *v.* Bloss (1906) 185 N. Y. 42.

[9]See note 7 *supra.*

[10]See City of Rochester *v.* Gleichauf (N. Y. 1903) 40 Misc. 446, 448; City of Rochester *v.* Rochester Ry. Co. (N. Y. 1905) 109 App. Div. 638; City of Rochester *v.* Bloss *supra.*

[11]Leonard *v.* Columbia Steam Navigation Co. (1881) 84 N. Y. 48; McDonald *v.* Mallory (1879) 77 N. Y. 546; Wooden *v.* Railway Co. (1891) 126 N. Y. 10; Marshall *v.* Sherman (1895) 148 N. Y. 9; Johnson *v.* Phoenix Bridge Co. (1910) 179 N. Y. 316. The result of these cases seems to be that for an action to be maintainable in New York on a foreign statute, the liability must be considered contractual in its nature or the remedy sought to be enforced must be substantially similar to one existing in New York at common law or by statute.

none is maintainble by the *lex fori*,[12] seems preferable on principle.[13] This conclusion is fortified by the fact that the taxing State has an exclusive right to summary remedies for the collection of taxes, while the foreign State is confined to the slower process provided for the enforcement of debts owing to individuals.[14]

If these premises be sound we are led to a consideration of the principles of comity and their applicability here. Clearly the New York court is not absolutely bound by any rule of comity to enforce the tax laws of another State, since it belongs exclusively to each sovereignty to determine for itself to what extent it shall exercise comity.[15] But the very enunciation of this principle shows that within the wide latitude attendant upon its operation the courts can easily and consistently adopt a broad and liberal policy adapted to modern conditions. An historical examination of the subject shows that the reluctance entertained by one country to enforce similar laws of another country was originally manifested at a time when intermittent actual war and constant commercial war was the prevailing condition.[16] Certainly this reason for the rule fails totally when the question arises among sister States of this nation. A further objection may be made that the sustainment of this action might result in double taxation. If this be proved to be actually the fact in a given case, then indeed is the time for the court to refuse to enforce a foreign tax law. But if such is not the case, then what possible objection remains to the exercise of comity?[17] It is submitted that if all the State courts took the view herein advanced, in no sense would they be neglecting their duty to their own citizens or discriminating against them, while on the other hand the indirect beneficial result is obvious.[18]

ELECTION OF REMEDIES.—In order to do justice, the law often allows an injured party to make his choice between two versions of the same transaction, a privilege which, though often spoken of as an election of remedies, is in reality an election of the rights which lie back of all actions.[1] So, at early common law when a tortious pos-

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[12]Herrick *v.* Minneapolis and St. Louis R. R. Co. (1883) 31 Minn. 11; Northern Pacific R. R. *v.* Babcock (1894) 154 U. S. 190.

[13]The law in this country has passed through three distinct stages: first, the narrow Massachusetts doctrine; see Richardson *v.* New York Central Ry. Co. (1867) 98 Mass. 85; Davis *v.* New York and New England Ry. Co. (1887) 143 Mass. 301; second, the somewhat less narrow New York doctrine, see note 11 *supra;* third, the liberal and preferable Western doctrine, see note 12 *supra.*

[14]2 Cooley, Taxation, 828.

[15]Marshall *v.* Sherman *supra.*

[16]For instance, the relations between England and Spain down to the Napoleonic period.

[17]Note the language of the court in Howarth *v.* Angle (1900) 162 N. Y. 179, 192.

[18]Extra-judicial recognition of foreign taxes is becoming more and more frequent. For instance, in administrative proceedings on the settlement of an estate in State A, inquiry is made as to the extent to which the estate is taxed in State B, and the tax in A is cut down correspondingly. And see Matter of Cooley (1906) 186 N. Y. 220.

[1]Butler *v.* Hildreth (Mass. 1842) 5 Met. 49.